

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

DERRICK HARVEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:05-CV-1383 CAS
	)	
ROBERT MCFADDEN,	)	
	)	
Respondent.	)	

**MEMORANDUM AND ORDER**

This closed federal prisoner habeas matter under 28 U.S.C. § 2241 is before the Court on a letter from petitioner Derrick Harvey dated March 26, 2007, which the Court construes as a motion to reopen the instant § 2241 habeas case. In the letter, petitioner contends that under the Eighth Circuit’s decision in United States v. McCall, 439 F.3d 967 (8th Cir. 2006), which held that “a violent felony within the meaning of § 924(e)(2)(B)(ii) includes any crime whose elements involve conduct that necessarily presents a serious potential risk of physical injury to another,” id. at 971, his state court conviction for manslaughter is not a “crime of violence” and as a result he should not have been sentenced as a career offender.

On July 2, 1999, petitioner pleaded guilty to one count of possessing heroin with intent to distribute and one count of possessing a firearm during and in relation to a drug trafficking crime. See United States v. Harvey, No. 4:99-CR-91 CAS (E.D. Mo.). Petitioner was subsequently sentenced as a career offender to 210 months imprisonment on the possession charge and 60 months imprisonment on the firearm charge, the sentences to run consecutively. Id. Petitioner’s convictions

and sentences were affirmed on direct appeal by the Eighth Circuit Court of Appeals. United States v. Derek Harvey, 242 F.3d 377 (8th Cir. 2000) (unpublished table decision).

In 2001, petitioner filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Harvey v. United States, No. 4:01-CV-1824 CAS (E.D. Mo.). The Court denied petitioner's motion to vacate on the merits by Memorandum and Order dated May 27, 2003. Petitioner did not appeal the denial of his § 2255 motion.

In 2005, petitioner filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the instant case. Harvey v. McFadden, No. 4:05-CV-1383 CAS (E.D. Mo.). The Court denied petitioner's application, stating in part that "[b]ecause petitioner has previously sought and been denied relief under § 2255, he cannot attack the validity of his conviction in a § 2241 proceeding unless he first establishes that the § 2255 action was 'inadequate or ineffective.'" Mem. and Order of Oct. 11, 2005 at 2 [Doc. 6]. The Court rejected petitioner's contention that his § 2255 habeas proceeding had been "inadequate or ineffective," and noted that "§ 2255 provides for the filing of second or successive § 2255 motions when such motions have been certified by a panel of the Eighth Circuit Court of Appeals to contain 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" Id. at 3 (quoting 28 U.S.C. § 2255). The Court stated that petitioner had not shown that he had "sought certification to bring a second or successive § 2255 motion based on the purported change" in the law effected by Leocal v. Ashcroft, 543 U.S. 1 (2004). See Mem. and Order of Oct. 11, 2005 at 4.

The instant motion does not reflect that petitioner has sought certification from the Eighth Circuit Court of Appeals to bring a second or successive § 2255 motion based on the purported change in the law made by Leocal v. Ashcroft, 543 U.S. 1 (2004), and McCall, 439 F.3d 967. The

Court is without authority to consider petitioner's claims unless and until petitioner first obtains certification from the Eighth Circuit for leave to proceed with a second or successive motion under § 2255. Petitioner cannot obtain the relief he seeks in the instant closed § 2241 matter.

Accordingly,

**IT IS HEREBY ORDERED** that petitioner Derrick Harvey's letter to the Court dated March 26, 2007, construed as a motion to reopen the instant § 2241 habeas case, is **DENIED**. [Doc. 8]

A handwritten signature in cursive script, appearing to read "Charles A. Shaw", written in dark ink.

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**CHARLES A. SHAW**  
**UNITED STATES DISTRICT JUDGE**

Dated this 2nd day of April, 2007.